86-684

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

BILLY GREENWOOD AND
DYANNE VAN HOUTEN,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District

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QUESTION PRESENTED

DO WARRANTLESS TRASH SEARCHES OF DISCARDED GARBAGE VIOLATE THE FOURTH AND FOURTEENTH AMENDMENTS?*

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* Certiorari has been granted by this Court on the same issue in *California v. Rooney*, 85-1835 on October 14, 1986.

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Respondents.

Petition for Writ of Certiorari

Petitioner, State of California respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Three, which held that warrantless trash searches of discarded garbage violate the Fourth Amendment and therefore affirmed the trial court's dismissal of felony drug charges against Respondents.

OPINIONS BELOW

The Opinion of the Court of Appeal (Appendix A) is published as *People v. Billy Greenwood, et al.*, (182 Cal.App.3d 729 (1986).

The order of the California Supreme Court denying Petition for Review is attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, was filed on June 23, 1986.

A timely Petition for Review was denied by the California Supreme Court on August 28, 1986.

Where the highest state court has jurisdiction to review a decision of a lower state court, but refuses to do so, the time for petitioning for a Writ of Certiorari runs from the date of the refusal to review. [*American Railway Express v. Levee*, 263 U.S. 19, 20-21 (1923).]

This petition, filed within 60 days of that date, is timely. This Court's jurisdiction is invoked under 28 USCA section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.
>
> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend XIV,§ 1.

STATEMENT OF THE CASE[1]/

Respondents were charged in a felony complaint with possession of cocaine for sale. Greenwood was also charged with possession of marijuana for sale and possession of Psilocybin (C.T. 2).

Following a preliminary examination, the Respondents were held to answer in superior court. The magistrate denied Respondent's motion to quash search warrants. (C.T. 43).

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[1] The designation 'C.T.' refers to the Clerk's transcript. The designation 'R.T.' to the Reporter's Transcript.

A five-count information was filed in Superior Court charging Greenwood and Van Houten with possession of cocaine for sale and with possession of cocaine. Greenwood was also charged with possession of marijuana for sale and possession of Psilocybin (C.T. 253-254).

On February 1, 1985, the trial court granted Respondent's motion to set aside the information and dismissed the case (C.T. 261), on the basis that the Fourth Amendment prohibits warrantless trash searches (R.T. 22-23, 26).

The People appealed that ruling to the Court of Appeal, Fourth District, which affirmed based on the 1971 decision of the California Supreme Court in *People v. Krivda*, 5 Cal.3d 357, which held that warrantless trash searches violate the Fourth Amendment.

The California Supreme Court denied a Petition for Review.

STATEMENT OF FACTS

The relevant facts are detailed in the Court of Appeal Opinion, therefore, only a few summarizing sentences are added.

Based on tips received by the Laguna Beach Police Department that Greenwood was involved in drug trafficking, investigators conducted warrantless trash searches of Greenwood's garbage on April 6, 1984, and on May 4, 1984. Each time trash collectors picked up the garbage from the street in front of the single family residence with a detached guest house and turned it over to the police (C.T. 100, 148).

Both times evidence of drug trafficking was uncovered which was used to obtain search warrants, each of which led to the seizure of drugs and the instant prosecution.

The affidavits in support of the search warrants detailed the trash collection (C.T. 296-319).

The superior court granted Respondent's motion to set aside the information.

While expressing dissatisfaction with *Krivda*, the court felt bound to follow it.

> It's difficult when you find a case on the federal level that is much more well-reasoned than the California Supreme Court case involving *People v. Krivda*. And it's difficult for a trial court when you look at the rationality, in my opinion, of the *Krivda* decision (R.T. 26.)
>
> I think I'm bound distastefully to grant your 995. . . . Quite frankly, I hope this is one time that the California Supreme Court overturns this trial court. (R.T. 27, 28.)

The Court of Appeal, in affirming, noted:

> Despite holdings to the contrary in our federal courts, this court is bound by *Krivda* unless or until the United States Supreme Court addresses the same question or our own Supereme Court overrules *Krivda*. (182 Cal.App.3d at 735, App. A, pg. 14.)

HOW THE FEDERAL QUESTION IS PRESENTED

Respondents argued (unsuccessfully) to the preliminary hearing magistrate that warrantless trash searches violate the Fourth Amendment (C.T. 15, 17, 20). Their motion to quash the search warrants was denied (C.T. 43).

Respondent's motion to set aside the information was based on the contention that such searches violate the Fourth Amendment (C.T. 290-293; R.T. 8, 16).

The trial court granted their motion (C.T. 261; R.T. 22-23, 26).

The Court of Appeal decision, affirming dismissal, rests solely on the Fourth Amendment grounds.

REASONS WHY THE WRIT SHOULD BE GRANTED

The decision by the California Court of Appeal on this Fourth Amendment question is in conflict with decisions of every federal

court of appeals to decide the issue (i.e. Circuits 1-9, inclusive) and with decisions of virtually every other state court of last resort to consider the issue. [Rule 17.1(b).]

Further, the decision of the California Court of Appeal has decided an important and recurring question of federal law, which has not been, but should be, settled by this Court. [Rule 17.1(c).]

The California Court of Appeal found itself bound by the 1971 *Krivda* decision "unless or until the United States Supreme Court addresses the same question or our own Supreme Court overrules *Krivda*" (182 Cal.App.3d at 735).

The California Supreme Court declined Petitioner's invitation to correct its earlier error.

In *People v. Krivda* (1971) 5 Cal.3d 357, the California Supreme Court, in a four to three decision, held that a warrantless trash search violated defendant's reasonable expectation of privacy.

The United States Supreme Court granted certiorari, but being unable to determine whether *Krivda* had been decided on federal grounds, state grounds or both, this Court vacated and remanded for clarification. 409 U.S. 33[2]

The California Supreme Court, on remand, responded it had relied on both Federal and independent state grounds. [*People v. Krivda* (1973) 8 Cal.3d 623.]

But, as the California Court of Appeal noted, in the case at bar:

> Subsequent to *Krivda* and prior to the offenses charged here, California enacted Proposition 8 (Cal.Const., art I, § 28, subd. (d)), and eliminated an accused's right to suppress evidence seized in violation of the California, but not the Federal, Constitution. (See *In re Lance W.* (1985) 37 Cal.3d 873) (App. A, pg. 13.)

Thus the independent state grounds that insulated *Krivda* from review by this Court 15 years ago is gone.

Petitioner submits that review of that 1971 Fourth Amendment determination is appropriate in view of its subsequent unanimous rejection by the federal courts of appeals.

---

[2] Under existing practice, this Court might have reached the merits in *Krivda*. (See *Michigan v. Long* 463 U.S. 1032, 1040-1041.)

Every federal circuit court of appeals considering the issue has concluded that warantless trash searches do not violate the Fourth Amendment. (*United States v. Mustone* (1st Cir. 1972) 469 F.2d 970; *United States v. Terry* (2nd Cir. 1981) 702 F.2d 299, cert.den _____ U.S. _____, 103 S.Ct. 2095; *United States v. Reicherter* (3rd Cir. 1981) 647 F.2d 397; *United States v. Crowell* (4th Cir. 1978) 586 F.2d 1020, cert.den 440 U.S. 959; *United States v. Vahalik* (5th Cir. 1979) 606 F.2d 99 (cert.den.606 U.S. 1081); *Magda v. Benson* (6th Cir. 1976) 536 F.2d 111; *United States v. Shelby* (7th Cir. 1978) 573 F.2d 971 (cert.den. 439 U.S. 841); *United States v. Biondick* (8th Cir. 1981) 652 F.2d 743 (cert.den. 454 U.S. 975); *United States v. Dela Espirella* (9th Cir. 1986) 781 F.2d 1432.

Most recently in *Dela Espirella, supra*, the Ninth Circuit ruled on a warrantless trash search case from California:

> As a part of their investigation, federal agents searched trash containers placed for curbside collection outside Ronderos' home. The agents discovered various documents in the trash that were used to obtain a search warrant and were introduced into evidence at trial. Ronderos argues that the district court erred in not suppressing this evidence as obtained in violation of the fourth amendment.
>
> We find this argument to be without merit. Warrantless searches of abandoned property do not violate the fourth amendment. The question, then, becomes whether placing garbage for collection constitutes abandonment of the property. We join the other federal appellate circuits that have considered the matter and hold that it does. (781 F.2d at 1437.)

In the *United States v. Shelby, supra*, the court held:

> As we see the issue, it is whether or not the search of the trash constituted a violation of the defendant's reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). It is defendant's position that he had a reasonable expectation of privacy in his

> trash since he contemplated that it would be collected and disposed of by intermingling with other trash and eventually destroyed. Perhaps the defendant did in fact believe that the incriminating evidence of his crime so disposed of would go undetected. If defendent did, we view it only as additional bad judgment on his part. In the real world to so view the status of one's discarded trash is totally unrealistic, unreasonable, and in complete disregard of the mechanics of its disposal.
>
> . . .
>
> It therefore seems to be more prudent to put only genuine trash, not secrets, in garbage cans, except perhaps in California.

The court found *Krivda* "is too unrealistic to be pursued." (573 F.2d at 974, cert.den. 439 U.S. 831.)

The majority of state courts considering the issue have likewise concluded that warrantless trash searches of garbage left out for collection are not violative of the Fourth Amendment. [see *People v. Huddleston* (1976) 38 Ill.App.3d 277, 347 N.E. 2d 76; *Smith v. State* (1973 Alaska) 510 P.2d 793; *State v. Fassler* (1972 Arizona) 503 P.2d 807; *Croker v. State* (1970 Wyoming) 477 P.2d 122; *State v. Purvis* (1968 Oregon) 438 P.2d 1002; *People v. Whotte* (1982 Michigan) 317 N.W.2d 266; *State v. Oquist* (1982 Minnesota) 327 N.W.2d 587; *State v. Brown* (1984 Ohio) 484 N.E.2d 215; *State v. Stevens* (1985 Wis.) 367 N.W. 2d 788; *State v. Schultz* (1980 Fla.) 388 So.2d 1326.]

Krivda's holding that warrantless trash searches violate Federal law would, no doubt, surprise Federal officers all of whom, under the authorities cited, may lawfully make the searches *Krivda* says they can't.

Krivda requires re-examination! It is not a correct statement of Federal law.

Of *Krivda*, it may truly be said:

> One may seriously and fairly question the strength of a juridical light that is discerned by so

few and invisible to so many. [*People v. Disbrow* (1976) 16 Cal.3d 101, dissenting opinion of Justice Richardson at 129.]

Wherefore, Petitioner respectfully requests this Honorable Court to grant certiorari.

Dated this day of October, 1986.

Respectfully submitted,

CECIL HICKS, District Attorney
County of Orange, State of California
MICHAEL R. CAPIZZI, Assistant District Attorney
WILLIAM W. BEDSWORTH, Deputy-In-Charge
Writs and Appeals Section
MICHAEL J. PEAR, Deputy District Attorney

Attorneys for Petitioner

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Appellant,

v.

BILLY GREENWOOD et al.,
Defendants and Respondents.

G002400
(Super. Ct. No. C-55040)
O P I N I O N

APPEAL from a judgment of the Superior Court of Orange County, David O. Carter, Judge. Affirmed.

Cecil Hicks, District Attorney, Michael R. Capizzi, Assistant District Attorney, William W. Bedsworth and Michael J. Pear, Deputy District Attorneys, for Plaintiff and Appellant.

Garey & Bonner and Michael Ian Garey for Defendant and Respondent Billy Greenwood.

Ronald Y. Butler, Public Defender, Frank Scanlon, Assistant Public Defender, Richard Aronson and Richard Schwartzberg, Deputy Public Defenders, for Defendant and Respondent Dyanne Van Houten.

In 1971 the California Supreme Court held that a warrantless search of trash barrels left for routine collection violated the Fourth Amendment. (*People v. Krivda* (1971) 5 Cal.3d 357.) The prosecution argues the *Krivda* holding is erroneous and directly contradicts the majority of our federal circuit courts and other state courts which have ruled on this question. We must determine whether *Krivda* is binding precedent.

* * *

Billy Greenwood and Dyanne Van Houten were charged with felony narcotics possession offenses after contraband was twice discovered in Greenwood's home during the execution of two different search warrants in 1984. Both warrant affidavits included incriminating information obtained from warrantless searches and seizures of trash Greenwood left for collection at the curb. While the preliminary hearing magistrate upheld each warrant, the superior court disagreed and granted Greenwood's and Van Houten's motion to set aside the information (Pen. Code, § 995), concluding their motion to suppress evidence (Pen. Code, § 1538.5) seized pursuant to the warrants should have been granted at the preliminary hearing. The prosecution appeals.

In early February 1984, a federal narcotics agent from the Drug Enforcement Administration (DEA) contacted Laguna Beach Police Investigator Jenny Stracner. The agent informed Stracner that a suspect in custody in Nevada had told him that a large U-Haul truck full of drugs was en route to 1575 Fayette Place, Laguna Beach. Greenwood lived at that address. The agent and Stracner searched for the truck, but were unable to find it.

Later in February, a neighbor of Greenwood's telephoned Stracner to complain about heavy vehicular traffic late at night and early in the morning in front of Greenwood's house. The caller said people in the cars went into Greenwood's house but usually only stayed a few minutes. She also told Stracner that a large U-Haul truck had been parked in front of the house for four days.

On February 14, 1984, Stracner conducted a surveillance of Greenwood's house between 11 p.m. and 2:30 a.m., observing four vehicles arrive and depart at separate times. The next day, Stracner and another officer watched again, from 11 p.m. to 2 a.m., observing four different vehicles arrive and depart at separate times. No vehicle stayed longer than ten minutes.

On February 23, 1984, the same neighbor told Stracner that a large Jartran truck was parked in front of Greenwood's house. Stracner contacted an investigator from the County Sheriff's department, who went to the location with a dog trained to detect narcotics. A canine sniff-search yielded negative results. Later the same day, Stracner and Investigator Jimenez followed the Jartran truck to a residence in Newport Beach, which Stracner learned had previously been under investigation as a narcotics trafficking location.

In February, Stracner began to monitor and search the trash set out for collection in front of Greenwood's house. On April 6, 1984, at 6 a.m., Stracner drove past the house and observed a man put some trash out in front. Stracner told the trash collector that she wanted the trash. The trash collector cleaned his truck bin of other refuse and collected Greenwood's trash. The collector then gave it to Stracner. When Stracner searched it, she found evidence of drug trafficking.

The same day, Stracner obtained a search warrant for Greenwood's home, described as a two-story house with a detached guesthouse. The affidavit in support of the warrant outlined the above facts, including the results of the warrantless trash can search, in detail.

That evening Stracner and other police officers executed the warrant. As the officers approached Greenwood's home, they could see Greenwood, Van Houten, and another woman inside through the glass front doors. The officers knocked, announced their purpose, and demanded entry. Greenwood ran upstairs and one of the women ran out of sight. After repeating the announcement and getting no response, the officers forced entry. A substantial quantity of cocaine was seized in the ensuing search and all three occupants were arrested. Each posted bail.

Subsequently, Stracner told Investigator Rahaeuser the details of the investigation and arrests. Thereafter, the same neighbor of Greenwood's who had spoken to Stracner communicated directly with Rahaeuser. On three separate occa-

sions between April 16 and May 3, the neighbor told Rahaeuser about continuing heavy late-night vehicle traffic at Greenwood's house. On May 3, yet another police officer, Officer Ishmael, was at Greenwood's house in response to an unrelatd disturbance complaint. Ishmael spoke with a woman at the house who seemed very nervous. She only opened the door enough to step out, closing it behind her. While she spoke to Ishmael, several persons peeked out from behind curtains. Ishmael explained all this to Rahaeuser.

On May 4, Rahaeuser drove by Greenwood's house and observed a man put more trash out for collection. Rahaeuser took possession of Greenwood's trash from the official trash collector in the same manner as Stracner had done previously. Again, Greenwood's trash contained evidence of drug trafficking. On May 9, Rahaeuser obtained another search warrant for Greenwood's house. He executed it three days later, finding more drugs, and more evidence of drug trafficking. Greenwood was again arrested.

I

Each warrant is dependent on the information from the two trash searches. In other words, if the fruits of the trash searches are excised from the warrant affidavits, those affidavits lack probable cause to search because there was no information supporting a reasonable conclusion narcotics would be found in Greenwood's house at that time. (*Raymond v. Superior Court* (1971) 19 Cal.App.3d 321, 327). Without the evidence of current trafficking found in the trash, the remaining information in the warrant affidavits was stale and fell short of establishing probable cause to search. (See *Sgro v. United States* (1932) 287 U.S. 206; *Alexander v. Superior Court* (1973 9 Cal.3d 387; *Hemler v. Superior Court* (1975) 44 Cal.App.3d 430.)

II

People v. Krivda, supra, 5 Cal.3d 357 held that warrantless trash searches are illegal because the owner maintains an expectation of privacy even though he has set the trash out for collection. Under *Krivda*, a trash can placed in front of an accused's house for collection is not abandoned property.

Thus, the court prohibited the "practice whereby our citizens' trash cans could be made the subject of police inspection without the protection of applying for and securing a search warrant." (*Id.* at p. 367).

Subsequent to *Krivda* and prior to the offenses charged here, California enacted Proposition 8 (Cal. Const., art. I, § 28, subd. (d)), and eliminated an accused's right to suppress evidence seized in violation of the California, but not the federal, Constitution. (See *In re Lance W.* (1985) 37 Cal.3d 873.) Thus, the first question is whether *Krivda* was based on the federal or state Constitution. This same question was posed to the *Krivda* court by the United States Supreme Court in response to a petition for writ of certiorari. On remand, the California Supreme Court expressly stated its holding invalidating warrantless trash searches was based on both the Fourth Amendment to the United States Constitution and article I, section 19, of the California Constitution. (*People v. Krivda* (1973) 8 Cal.3d 623, 624).

Under the doctrine of stare decisis, we are bound by the California Supreme Court's interpretation of the Fourth Amendment in *Krivda* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), unless the United States Supreme Court has decided the question differently. (*People v. Rooney* (1985) 175 Cal.App.3d 634, 644.) At oral argument, the prosecution agreed it had not and further agreed *Krivda* was binding on this court because of stare decisis. It urges *Krivda* needs reexamination, but concedes that reexamination must be undertaken by our state Supreme Court. It is not this court's place to question the pronouncements of our state Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.)

We are convinced neither the trial court nor this court may reexamine the rule in *Krivda* which declares warrantless trash searches illegal. Indeed, the only other published decision on this question reached the same result. (*People v. Rooney, supra*, 175, Cal.App.3d 634, 644.) And the petitions for review in that case were denied. While ordinarily our state Supreme

Court's denial of review "is not to be regarded as expressing approval of the propositions of law set forth in an opinion of the District Court of Appeal or as having the same authoritative effect as an earlier decision of [the Supreme Court] [citations]." It does not follow that such a denial is without significance as to [the Supreme Court's] views [citations]." (*DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 178; see also *McGlothlen v. Department of Motor Vehicles* (1977) 71 Cal.App.3d 1005, 1017; *Phillips v. Bartolomie* (1975) 46 Cal.App.3d 346, 351).

Despite holdings to the contrary in our federal courts, this court is bound by *Krivda* unless or until the United States Supreme Court addresses the same question or our own Supreme Court overrules *Krivda*. (*People v. Neer* (1986) 177 Cal.App.3d 991.) The warrantless trash searches here were illegal and the warrants based on them should have been quashed. (*Raymond v. Superior Court*, *supra*, 19 Cal.App.3d at p. 327.)

III

The prosecution also challenges Van Houtens's standing to suppress evidence, because she did not make a showing establishing an expectation of privacy in Greenwood's trash. Preliminarily, we note Van Houten was only charged with possession offenses relating to narcotics found in her purse, which was in Greenwood's home. Undeniably, the record establishes her standing to challenge the search of her purse. (See *United States v. Salvucci* (1980) 448 U.S. 83.) That search was predicated on the warrant for Greenwood's house, where Van Houten probably also had an expectation of privacy due to her physical presence at the time the search warrant was executed. In any event, the expectation of privacy question relates to her purse. We would not require a separate showing of standing as to Greenwood's trash to challenge the purse search.

Moreover, had the prosecution raised the standing question during the evidentiary hearing in municipal court, Van Houten may well have established an expectation of privacy

in Greenwood's trash. The prosecution's failure to challenge her standing there constitutes a waiver of the issue here. (*Steagald v. United States* (1981) 451 U.S. 204, 208-209.)

In light of our required allegiance to *Krivda*, none of the other issues raised by the parties need be discussed. The motion to suppress evidence should have been granted at the preliminary hearing. The superior court judge correctly ruled that error required he set aside the information as to both Greenwood and Van Houten.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

/s/ Wallin

Wallin, J.

WE CONCUR:

/s/ Trotter

Trotter, P.J.

/s/ Sonenshine

Sonenshine, J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 3, No. G002400

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, Appelant,

v.

BILLY GREENWOOD et al.,
Respondents.

SUPREME COURT

FILED

AUG 28 1986
Laurence P. Gill, Clerk

DEPUTY

Appellant's Petition for review DENIED.

Lucas, J. and Panelli, J., are of the opinion the petition should be granted.

BIRD
Chief Justice

PROOF OF SERVICE BY MAIL

I, Arthur E Vorderer, declare that I am a resident of the County of Orange, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 2136 South Wright Street, Santa Ana, California.

On the 24th day of October, 1986, I served within PETITION FOR WRIT OF CERTIORARI on the Respondents herein, by placing a true copy thereof enclosed in a sealed envelope, postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

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All parties required to be served have been served.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 1986 at Santa Ana, California.

_____